

FEDERAL CIRCUIT COURT OF AUSTRALIA

BES16 v MINISTER FOR IMMIGRATION & ANOR

[2017] FCCA 820

Catchwords:

MIGRATION – Review of Administrative Appeals Tribunal decision – refusal of a protection visa – applicant claiming political persecution in Bangladesh – Tribunal finding that it was prevented from granting the applicant a visa because he had submitted bogus documents concerning his identity and personal details – whether the Tribunal breached s.424A or s.425 of *Migration Act 1958* (Cth) or misunderstood or misapplied s.91WA(2)(a) considered.

Legislation:

Migration Act 1958 (Cth), ss.5, 45AA, 65, 91WA, 412, 414, 415, 422B, 424A, 424AA, 425

Cases cited:

Applicant VEAL of 2002 v Minister for Immigration (2005) 225 CLR 88
ATP15 v Minister for Immigration (2016) 241 FCR 92
Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd (1994) 49 FCR 576
CQG15 v Minister for Immigration [2016] FCAFC 146
Minister for Immigration v Applicant A125 of 2003 (2007) 163 FCR 285
Minister for Immigration v Brar (2012) 201 FCR 240
Minister for Immigration v SZLFX (2009) 238 CLR 507
Minister for Immigration v SZTJF (2015) 149 ALD 552
Minister for Immigration v SZTQS (2015) 148 ALD 507
Muin v Refugee Review Tribunal (2002) 76 ALJR 966
MZXBQ v Minister for Immigration (2008) 166 FCR 483
Re Minister for Immigration; Ex parte Durairajasingham (2000) 74 ALJR 405
SZBYR v Minister for Immigration (2007) 81 ALJR 1190
SZBEL v Minister for Immigration (2006) 228 CLR 152
SZHKA v Minister for Immigration (2008) 172 FCR 1
SZJBD v Minister for Immigration (2009) 179 FCR 109
SZTGV v Minister for Immigration (2015) 229 FCR 90
SZTNL v Minister for Immigration (2015) 231 FCR 204
Trivedi v Minister for Immigration (2014) 141 ALD 252

Applicant: BES16

First Respondent: MINISTER FOR IMMIGRATION &
BORDER PROTECTION

Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	SYG 1244 of 2016
Judgment of:	Judge Driver
Hearing date:	26 April 2017
Date of last submissions:	7 June 2017
Delivered at:	Sydney
Delivered on:	21 June 2017

REPRESENTATION

Counsel for the Applicant:	Mr J F Gormly
Solicitors for the Applicant:	Labour Pains Legal
Counsel for the Respondents:	Mr B D Kaplan
Solicitors for the Respondents:	Sparke Helmore

ORDERS

- (1) The further amended application filed on 28 April 2017 is dismissed.
- (i)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 1244 of 2016

BES16

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Introduction and background

1. The applicant seeks judicial review of a decision of the Administrative Appeals Tribunal (Tribunal) made on 4 May 2016. The Tribunal affirmed a decision of a delegate of the Minister (delegate) not to grant the applicant a protection visa.
2. The following statement of background facts is derived from the submissions of the parties.
3. The applicant is a citizen of Bangladesh. He is 31 years old having been born on 3 August 1985.

4. The applicant arrived in Australia on 6 May 2013 as an unauthorised maritime arrival.
5. On 13 August 2013 the applicant applied for a permanent protection (Class XA) visa. This application was subsequently converted to an application for a temporary protection (Class XD) by operation of s.45AA of the *Migration Act 1958* (Migration Act) and regulation 2.08F of the *Migration Regulations 1994* (Cth) (Regulations).
6. The applicant claimed to fear harm due to his political opinion and activities in support of the Bangladesh Nationalist party, and arising from a family land dispute with his uncle¹.
7. In support of his application the applicant submitted a document purporting to be a copy of his birth certificate (the first birth certificate)².
8. On 11 May 2015 the delegate decided to refuse to grant the applicant a temporary protection visa. The delegate considered the applicant's claims for protection but was not satisfied the applicant had a real chance of being persecuted for a Convention reason or that there was a real risk he would be subjected to significant harm. The delegate accepted the applicant's claimed identity³ and that he was a citizen of Bangladesh⁴, but placed "no weight" on the first birth certificate and other submitted identity documents in coming to these conclusions⁵. That was because country information stated that "false documents are common in Bangladesh, and the contents of genuine documents are often incorrect due to high levels of corruption in the Bangladesh government"⁶.
9. On 15 May 2015 the applicant applied to the Refugee Review Tribunal for review of the delegate's decision.
10. In support of his application for review the applicant submitted a document purporting to be another birth certificate (the second birth

¹ Court Book (CB) 28-32

² CB 24

³ CB 101

⁴ CB 103

⁵ CB 101

⁶ CB 100-101

certificate)⁷. This certificate bore some similarities to, as well as dissimilarities from, the first birth certificate, both in form and in content. Both certificates bore the same date of birth (in digits): 03/08/1985. The first birth certificate also bore another date in words which did not match this date. This fault was corrected in the second birth certificate. The second birth certificate was also said to be issued on 29 October 2008 and signed on 22 May 2013. However, the Tribunal found it was inconsistent with the first birth certificate in several respects⁸.

11. On 3 May 2016 the Tribunal conducted a hearing of this application for review⁹.
12. In the course of this hearing the applicant handed to the Tribunal another birth certificate (the third birth certificate)¹⁰. This third certificate bore a different personal identification number (PIN) to the PIN on both the first and second birth certificates. All three certificates bore the same date of birth in digits: 03/08/1985.
13. The Tribunal affirmed the delegate's decision based on s.91WA: that the applicant had provided bogus documents as evidence of his identity for which the applicant did not have a reasonable explanation. The Tribunal found at [29] that the first and second birth certificates were "bogus documents" as defined in s.5(1) of the Migration Act because, in part – though with significant weight - the Tribunal was unable to verify these certificates using the online Birth Registration Information System of Bangladesh (BRIS)¹¹. The BRIS system did not recognize a match between the PIN and the date of birth on both certificates¹².
14. The Tribunal found the third birth certificate was genuine using the BRIS¹³.

⁷CB 154

⁸ CB 192-193 [28]

⁹A transcript of this hearing is annexed to the affidavit of Penelope Pandora Pritchard affirmed 14 July 2016

¹⁰CB 171

¹¹at [28]

¹²at [15]

¹³[27]

15. As the Tribunal found s.91WA applied to the first and second birth certificates, it did not go on to consider any of the applicant's claims for protection.

The present proceedings

16. These proceedings began with a show cause application filed on 18 May 2016. At the trial of the matter on 26 April 2017, the applicant relied upon an amended application filed on 16 June 2016. There are three grounds in that application:

The decision of the second respondent (the Tribunal) was affected by jurisdictional error in that:

1. *the Tribunal failed to comply with s 424A(1) Migration Act 1958 (the Act) by not giving to the applicant clear particulars of information that was a reason, or part of a reason, for affirming the decision under review.*

Particulars

- i. *The information was the entry relating to the applicant's birth in the Birth Registration Information System of Bangladesh (BRIS). The Tribunal relied on this information to find that the third birth certificate provided by the applicant was authentic.*
 - ii. *The information was a reason, or a part of the reason, for affirming the decision under review as it proved the efficacy and accuracy of BRIS and thereby:*
 - a. *Contradicted the applicant's explanation as to why BRIS did not recognise a match between a "personal identification number" and dates of birth on two other birth certificates which the applicant had earlier provided; and*
 - b. *Allowed the Tribunal to rely on the failure of BRIS to recognise any match between a "personal identification number" and dates of birth on two other birth certificates in order to find that these birth certificates were not issued by the authorities and therefore bogus documents.*
2. *The Tribunal was in breach of s 425(1) of the Act in failing to accord the applicant procedural fairness.*

Particulars

- i. *Section 91WA(2) allowed the Tribunal to grant a protection visa even if an applicant had provided a bogus document as evidence of the applicant's identity, nationality or citizenship if it was satisfied the applicant had a reasonable explanation for providing the bogus document.*
 - ii. *The Tribunal did not give the applicant a fair opportunity to show he had "a reasonable explanation for providing the bogus document" because the Tribunal did not tell the applicant which provision of which document required a reasonable explanation as "the bogus document".*
 - iii. *The Tribunal instead identified a range of three birth certificates, which the applicant had each provided separately, and invited the applicant to put forward a reasonable explanation "in the event it found one or more of the birth certificates to be bogus documents". The Tribunal went on to find, without informing the applicant prior to its decision, that the first two birth certificates provided by the applicant were bogus, but that the third was genuine.*
 - iv. *Procedural fairness also required the Tribunal to conceive correctly what might amount to "a reasonable explanation for providing the bogus document" and the Tribunal did not do this: see ground 3.*
3. *The Tribunal misconceived and misapplied what "a reasonable explanation for providing the bogus document" might be for the purposes of s 91WA(2)(a) of the Act.*

Particulars

- i. *The Tribunal's treatment of 'the most plausible explanation' at [34] was based on a misunderstanding by the Tribunal that where a document is bogus, in the sense of "purposely untrue," its provision cannot at the same time be an "innocent, unintended or accidental matter" as discussed by the Federal Court in *Trivedi v MIBP* (2014) 141 ALD 252 at [32].*
- ii. *The effect of this misunderstanding was to exclude any explanation which conceded the document was bogus*

but nevertheless argued that its provision to the Minister was 'reasonable', for example for a lack of knowledge that the document was bogus on the part of the applicant or his mother at the time it was provided.

iii. As a result of this misunderstanding the review functions of the Tribunal miscarried because the Tribunal limited its review to matters relating to whether or not the birth certificates were bogus.

17. At the end of the trial, I gave the applicant leave to add an additional particular to Ground 2 in the amended application, to the effect that the Tribunal's post hearing enquiries gave rise to an additional issue requiring a further Tribunal hearing. The further amended application was filed on 28 April 2017 with the additional particular to Ground 2 expressed as follows:

Section 425(1) required the Tribunal to invite the applicant to appear before it to give evidence and present arguments relating to issues which arose after the hearing as a result of the Tribunal's location of a record relating to the applicant on the BRIS system after the hearing. The location of this record lead the Tribunal to find that the third birth certificate was genuine meaning that, by necessary implication, its form and content as an "extract from Birth Register" including the date of registration of the applicant's birth and the "Birth Registration No." on that document was correct, as opposed to the corresponding but differing form and content of the first and second birth certificates. The issue of these differences was critical to the Tribunal's consideration of whether the first and second certificates were issued by the authorities in Bangladesh as claimed by the applicant, or whether they were 'bogus documents'.

18. In addition to the court book filed on 29 July 2016, I have before me as evidence the affidavit of Penelope Pandora Pritchard made on 14 July 2016, to which is annexed a transcript of the Tribunal hearing conducted on 3 May 2016.
19. Both the applicant and the Minister filed pre-trial submissions which I found helpful, as well as making extensive oral submissions at the trial on 26 April 2017. In light of the additional particular to Ground 2, referred to above, I gave the parties the opportunity to file post-hearing submissions relating to that particular.

Consideration

The legislation

20. I accept the Minister's submissions concerning the relevant provisions of the Migration Act.
21. Section 414(1) of the Migration Act requires the Tribunal to review a Part 7-reviewable decision if a valid application is made under s.412.
22. Section 415(1) of the Migration Act provides that the Tribunal "may, for the purposes of the review of a Part 7-reviewable decision, exercise all the powers and discretions that are conferred by this Act on the person who made the decision." That is, the Tribunal may "exercis[e] afresh the Minister's power to grant or refuse to grant a visa"¹⁴ under s.65.
23. Section 65 of the Migration Act relevantly provides that the Minister, if satisfied that the grant of the visa is not prevented by s.91WA, is to grant the visa¹⁵, or, if not so satisfied, is to refuse to grant the visa¹⁶.
24. Section 91WA relevantly provides as follows:

Providing bogus documents or destroying identity documents

- (1) *The Minister must refuse to grant a protection visa to an applicant for a protection visa if:*
 - (a) *the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship ...*
 - ...
- (2) *Subsection (1) does not apply if the Minister is satisfied that the applicant:*
 - (a) *has a reasonable explanation for providing the bogus document ...; and*
 - (b) *either:*

¹⁴*Muin v Refugee Review Tribunal* (2002) 76 ALJR 966 at [242] per Hayne J. See also *Re Minister for Immigration; Ex parte Durairajasingham* (2000) 74 ALJR 405 at [70] (fn 59) per McHugh J; *Applicant VEAL of 2002 v Minister for Immigration* (2005) 225 CLR 88 at 93 [9] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ

¹⁵ subparagraph (1)(a)(iii)

¹⁶ subparagraph (1)(b)

- (i) *provides documentary evidence of his or her identity, nationality or citizenship; or*
- (ii) *has taken reasonable steps to provide such evidence.*

...

25. The phrase “bogus document” is defined in s.5(1) as follows:

***bogus document**, in relation to a person, means a document that the Minister reasonably suspects is a document that:*

- (a) *purports to have been, but was not, issued in respect of the person; or*
- (b) *is counterfeit or has been altered by a person who does not have authority to do so; or*
- (c) *was obtained because of a false or misleading statement, whether or not made knowingly.*

26. The conduct of reviews before the Tribunal is governed by the provisions in Division 4 of Part 7 of the Migration Act. Sections 424A and 425 relevantly provide as follows:

Information and invitation given in writing by Tribunal

(1) *Subject to subsectio[n] ... (3), the Tribunal must:*

- (a) *give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review ...*

...

...

(3) *This section does not apply to information:*

...

- (b) *that the applicant gave for the purpose of the application for review; or*

- (ba) *that the applicant gave during the process that led to the decision that is under review, other than such*

information that was provided orally by the applicant to the Department ...

...

Tribunal must invite applicant to appear

- (1) *The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.*

...

Ground 1 – did the Tribunal breach s.424A or s.424AA?

27. In this ground, the applicant asserts that the Tribunal failed to comply with s.424A(1) of the Migration Act because it did not give him clear particulars of certain information, namely, “the entry relating to the applicant’s birth in the Birth Registration Information System of Bangladesh (BRIS)” (particular (i)).
28. In the second particular to this ground, the applicant contends that this information was the reason, or a part of the reason, for affirming the delegate’s decision because “it provided the efficacy and accuracy of BRIS” and, thereby:
- a. *Contradicted the applicant’s explanation as to why BRIS did not recognise a match between a ‘personal identification number’ and dates of birth on two other birth certificates which the applicant had earlier provided; and*
 - b. *Allowed the Tribunal to rely on the failure of BRIS to recognise any match between a ‘personal identification number’ and dates of birth on two other birth certificates in order to find that these birth certificates were not issued by the authorities and therefore bogus documents.*
29. As noted above, the Tribunal said that it verified the third birth certificate by using the BRIS system following the hearing¹⁷. There

¹⁷at [27]

was no communication by the Tribunal with the applicant concerning this information prior to the Tribunal decision.

30. Pursuant to s.424AA the Tribunal told the applicant during the hearing that, prior to the hearing, it had attempted to verify the first and second birth certificates using the BRIS¹⁸. The applicant contends that this disclosure did not relieve the Tribunal of its obligation under s.424A in respect of the BRIS system's records of the applicant and its own recognition of these records. This is said to have been because the Tribunal's pre-hearing attempts to verify the first and second birth certificates did not access the same information in the BRIS system as the post-hearing searches by which the Tribunal verified the third birth certificate. This was apparently because the PIN on the first and second birth certificates was different to the PIN on the third birth certificate.
31. The applicant invited the Tribunal to check the BRIS online system but that was only in respect of the first and second birth certificates. That invitation was made prior to the applicant's tender of the third birth certificate¹⁹. The Tribunal responded that it had checked the BRIS for the first two birth certificates²⁰. The applicant handed over the third birth certificate later in the hearing²¹. The Tribunal did not subsequently tell the applicant that it would check the third birth certificate on the BRIS.
32. The applicant contends that the BRIS records and its recognition of them was a reason, or a part of the reason, for affirming the decision under review²² as it allowed the Tribunal to rely on the failure of the BRIS system to recognise any match between the PIN and the date of birth on each of the two other birth certificates²³ in order to find that these birth certificates were not issued by the authorities and were therefore bogus documents²⁴. The Tribunal said in the first dot point at [28] that it placed significant weight on the Tribunal's inability to verify the first and second birth certificates online using the BRIS. The underlying rationality of these conclusions that the BRIS could

¹⁸at [15]

¹⁹see Transcript, page 5, line 10

²⁰Transcript, page 5, lines 19-20

²¹at Transcript, page 6, line 4

²²per s.424A(1)(a)

²³at [15]

²⁴at [28]

recognise the applicant's birth was only proved by the BRIS' recognition of its own records relating to the applicant.

33. The BRIS records also contradicted the applicant's explanation as to why BRIS did not recognise a match between the PIN and date of birth on the first and second birth certificates.
34. I prefer the Minister's submissions concerning this ground.
35. The difficulty with this ground is that the entry relating to the applicant's birth in BRIS is not information of the kind to which s.424A(1) is directed. The Tribunal's disclosure obligation in s.424A(1) is enlivened only in respect of information that contains, "in [its] terms a rejection, denial or undermining of [a review applicant's] claims to be [a] perso[n] to whom Australia owe[s] protection obligations."²⁵ That obligation does not extend to, for example, inconsistencies that may be revealed in a review applicant's evidence, or an absence of evidence²⁶. Nor does s.424A(1) require the disclosure of "any process of comparison between [an] applicant's answers and the factual statements with which those answers [are] compared"²⁷. Further, it does not relate to information that "merely go[es] to credibility"²⁸.
36. In the present case, what counted against the applicant was not the entry in BRIS itself (or, as the applicant contends, "the BRIS system's own records relating to the applicant and its recognition of those records according to its own codes and procedures"). That information, viewed alone, was neutral in character, as it did not reject, deny or undermine the applicant's claims for protection (or his claim to have been born in Bangladesh).

²⁵*SZBYR v Minister for Immigration* (2007) 81 ALJR 1190 at 1196 [17] per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ; *Minister for Immigration v SZLFX* (2009) 238 CLR 507 at 513 [22] per French CJ, Heydon, Crennan, Kiefel and Bell JJ; *SZTGV v Minister for Immigration* (2015) 229 FCR 90 at 100 [18], 108 [50] per Perram, Jagot and Griffiths JJ; *ATP15 v Minister for Immigration* (2016) 241 FCR 92 at 105 [42] per Tracey and Griffiths JJ

²⁶*SZBYR v Minister for Immigration* (2007) 81 ALJR 1190 at 1196 [18]

²⁷*SZJBD v Minister for Immigration* (2009) 179 FCR 109 at 133 [104] per Buchanan J (with whom Perram J agreed at 133 [107]). See also *Minister for Immigration v Brar* (2012) 201 FCR 240 at 258 [67] per North, Greenwood and Besanko JJ; *SZTNL v Minister for Immigration* (2015) 231 FCR 204 at 220 [53] per Griffiths J; *Minister for Immigration v SZTJF* (2015) 149 ALD 552 at [30]-[32] per Yates J

²⁸*MZXBQ v Minister for Immigration* (2008) 166 FCR 483 at 492 [29] per Heerey J

37. What *did* count against the applicant, however, was the result of the Tribunal having compared the entry in BRIS relating to the applicant with the personal identification number and date of birth displayed on each of the first and second birth certificates. That result was that the first and second birth certificates were found not to have been issued by the authorities in Bangladesh. That is plain from the Tribunal's reasons at [15]²⁹, [28]³⁰ (first and second dot points). It was also accepted by the applicant in his submissions. The process of comparison employed by the Tribunal resulted in it identifying various discrepancies in the applicant's first and second birth certificates and his explanation as to why BRIS did not match the personal identification number and date of birth on those documents. Those discrepancies, in turn, led to the conclusion, at [29]³¹, that the first and second birth certificates were bogus documents. What results from a process of comparison, however, is not "information". As Buchanan J, with whom Perram J agreed, said in *SZJBD v Minister for Immigration*³² at 133 [104]:

[t]hat leaves only the factual statements themselves [here, the information in BRIS] but, shorn of the analytical context in which they played their part, they have ... no feature or attribute which makes them disclosable under s 424A.

38. Consequently, in so far as the Tribunal believed that it was required to put to the applicant, by adopting the procedure set out in s.424AA, the result of its having compared the first and second birth certificates with the records in BRIS relating to the applicant³³, it was mistaken. I find that the obligation in s.424A(1) was not enlivened in the first place vis-à-vis the entry relating to the applicant in BRIS. It follows that whether or not the Tribunal failed to comply with the procedure in s.424AA is of no moment³⁴.
39. The applicant takes issue with the Tribunal having verified the third birth certificate by using BRIS, locating a record relating to him, and

²⁹ CB 191

³⁰ CB 192-193

³¹ CB 193

³² (2009) 179 FCR 109

³³ As to which, see the affidavit of Penelope Pandora Pritchard affirmed on 14 July 2016, Annexure A Transcript, page 5, lines 18-30

³⁴ *Minister for Immigration v SZTJF* (2015) 149 ALD 552 at [26]-[29]. See also *SZTNL v Minister for Immigration* (2015) 231 FCR 204 at 219 [49]

accepting that that document was genuine, and not putting him on notice of this³⁵. For the reasons given above, the records relating to the applicant in BRIS do not amount to “information” for the purposes of s.424A(1)(a). Nor, for the same reasons, can it be said that the result of the Tribunal’s having compared the records in BRIS with personal identifiers in the third birth certificate amounts to information. Further, the result of any comparison can best be described as a subjective appraisal or determination (which is not evidentiary material)³⁶. Still further, even if it could be said that the result of the Tribunal’s comparison of the third birth certificate with the BRIS records otherwise amounts to information for the purposes of s.424A(1)(a), it would be excluded by s.424A(3)(b), the birth certificate having been given by the applicant for the purpose of the review. The same may be said with respect to any adverse information contained in the second birth certificate. Particulars of any adverse information in the first birth certificate would be excluded under s.424A(3)(ba).

40. Accordingly, I reject Ground 1.

Ground 2 – did the Tribunal breach s.425?

Applicant’s contentions

41. The applicant contends that the Tribunal was in breach of s.425(1) of the Migration Act in failing to accord him procedural fairness.

42. In *SZBEL v Minister for Immigration*³⁷ the High Court said of s.425 of the Migration Act at [33]:

The Act defines the nature of the opportunity to be heard that is to be given to an applicant for review by the Tribunal. The applicant is to be invited “to give evidence and present arguments relating to the issues arising in relation to the decision under review”.

43. Section 91WA(2) allowed the Tribunal to grant a protection visa even if an applicant had provided a bogus document as evidence of the applicant’s identity, nationality or citizenship, if it was satisfied the applicant had a reasonable explanation for providing the bogus document.

³⁵ CB 192 [27]

³⁶ *SZBYR v Minister for Immigration* (2007) 81 ALJR 1190 at 1196 [18]

³⁷ (2006) 228 CLR 152

44. The applicant contends that the Tribunal did not give him a fair opportunity to show he had “a reasonable explanation for providing the bogus document” because the Tribunal did not tell the applicant which birth certificate(s) required a reasonable explanation as “the bogus document”.
45. The Tribunal instead identified three birth certificates, which the applicant had each provided separately, and invited the applicant to put forward a reasonable explanation “in the event it found one or more of the birth certificates to be bogus documents”³⁸. The Tribunal went on to find, without informing the applicant prior to its decision, that the first two birth certificates provided by the applicant were bogus, but that the third was genuine.

Ground 2 (v) – additional particular

46. The additional particular of the Tribunal’s asserted breach of s.425(1) of the Migration Act by failing to afford procedural fairness concerns the additional issues which arose after the hearing and which were critical to the Tribunal’s finding that the first and second birth certificates were not issued by the Bangladesh authorities and therefore were “bogus documents” pursuant to s.5(a) of the Migration Act.
47. Each of the three birth certificates purported to be an “Extract from Birth Register”. There were differences of form and content between the third birth certificate (which the Tribunal found to be genuine) and the other certificates, including differences between the dates of registration of the applicant’s birth and the “Birth Registration No.”. Once the Tribunal located a record relating to the applicant which allowed it to accept the third birth certificate was genuine (and therefore to accept it as a genuine “Extract from Birth Register”) the differences of form and content between the genuine third birth certificate and the other birth certificates became issues critical to the Tribunal’s consideration of whether the other birth certificates were issued by the Bangladesh authorities as claimed by the applicant, or whether they were “bogus documents” within the meaning in s.5(a) of the Migration Act.

³⁸at [21]

48. The location of a record relating to the applicant on the BRIS system also allowed the Tribunal to come to its finding that the first two birth certificates were not issued by the Bangladesh authorities without the Tribunal having to make findings on the other criteria for “bogus documents” provided by ss.5(b) and (c).
49. In the course of argument counsel for the Minister accepted that if an issue of the type discussed in *SZBEL v Minister for Immigration* arose *after* the hearing, then s.425(1) obliged the Tribunal to invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issue.

Minister’s contentions

50. One of the issues arising on the review was whether, if the applicant did provide a bogus document as evidence of his identity, nationality or citizenship, nonetheless he had a reasonable explanation for having done so³⁹. On no less than two occasions, the Tribunal explained to the applicant the effect of s.91WA and advised him that it was required to refuse to grant a protection visa to him unless he had a reasonable explanation for providing bogus documents⁴⁰. On each occasion, the applicant was asked to provide a reasonable explanation. On each occasion, the applicant sought to do so. On the second occasion, the Tribunal posed the question on the assumption that it found that “one or more of the birth certificates [the applicant] provided [we]re bogus documents”⁴¹. That statement was made in circumstances where the applicant had just given to the Tribunal a third birth certificate. Thus, the Minister contends that the applicant could not have been under any misapprehension as to the effect of the Tribunal’s statement. The Tribunal invited the applicant to give a reasonable explanation in the event that it found that any or all of the three birth certificates were bogus documents.
51. The Minister contends that, in so far as the applicant is submitting that the Tribunal did not invite him to give evidence and present arguments in relation to the issue identified above, those submissions should not be accepted for the reasons given above. If, on the other hand, the

³⁹ cf s.91WA(2)(a)

⁴⁰ Transcript, page 5, lines 25-28, page 6, lines 31-34

⁴¹ Transcript, page 6, lines 31-32

applicant's complaint is that the Tribunal was required to identify the significance of its questions, the Minister refers to, and relies upon, the observations of Emmett, Weinberg and Lander JJ in *Minister for Immigration v Applicant A125 of 2003*⁴² at 302 [88]⁴³.

52. The Minister contends that, contrary to the applicant's submissions, s.425(1) does not require the Tribunal to give a running commentary on his evidence or to advise him as to which of the three birth certificates it may find to be bogus and invite him to comment⁴⁴.

The additional particular

53. The Minister accepted at the hearing, and continues to accept, that, if a new "issue" (as that word is understood in s.425(1) of the Migration Act) arose after the hearing, the Tribunal was required to issue a further invitation to the applicant pursuant to that section. In the present case, however, the Minister contends that no new issue arose after the hearing for the following reasons.
54. First, any "differences of form and content" between the first and second birth certificates and the third birth certificate were not "issues" for the purposes of s.425(1), as they were not dispositive to the review. Contrary to the applicant's submissions, none of the Tribunal's findings at [28]-[29]⁴⁵ that the first and second birth certificates were bogus documents was based on any difference in form or content between the first and second birth certificates and the third birth certificate. That includes the finding in the final dot point at [28]⁴⁶, which did not turn upon a comparison of the form and content of the birth certificates. Those findings were based primarily on the Tribunal's not having been able to verify, prior to the hearing, the birth registration number that appeared on the first and second birth certificates on the BRIS. To the extent that that gave rise to an "issue", it was addressed at the hearing⁴⁷.

⁴² (2007) 163 FCR 285

⁴³ See also *CQG15 v Minister for Immigration* [2016] FCAFC 146 at [92] per McKerracher, Griffiths and Rangiah JJ

⁴⁴ *SZBEL v Minister for Immigration* (2006) 228 CLR 152 at 166 [48] per Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ

⁴⁵ CB 192-193

⁴⁶ CB 193

⁴⁷ CB 191-192 [15]-[18]

55. Secondly, in so far as the Tribunal's finding that the first and second birth certificates were bogus documents was based on a comparison of the form and content of those certificates with those of the third certificate, any differences between them were not "issues" for the purposes of s.425(1); rather, they were the result of a comparison by the Tribunal of material that the applicant himself gave, the purpose of which was to persuade the Tribunal to find that his identity was as he had said. This sets apart the present case from cases such as *SZBEL v Minister for Immigration*⁴⁸, *SZHK v Minister for Immigration*⁴⁹ and *Minister for Immigration v SZTQS*⁵⁰. In each of those cases, the "issue" was one of which the review applicant was unaware had arisen on the review. The applicant in the present case was already on notice that an issue on the review was whether he had given a bogus document in support of his identity.
56. Thirdly, disclosure of the differences in form and content between the first and second birth certificates and the third birth certificate would have resulted in the Tribunal providing a running commentary on its thought processes as to whether any or all of the birth certificates was or were bogus, which s.425(1) does not require⁵¹. For the same reason, the Tribunal would not have been under an obligation to disclose those differences at a subsequent hearing, had it been held.
57. The Minister further notes the following, although, the submissions emphasise that, by making them, the Minister should not be taken to be suggesting that s.425(1) imports common law notions of procedural fairness, in the light of s.422B(1).
58. Had the Tribunal issued an invitation to the applicant to attend a second hearing to give evidence and present arguments on the result of the Tribunal's process of comparison of the birth certificates, it would have gone well beyond what the hearing rule at common law would have required. In the face of s.422B(1), it would be a curious result if s.425(1) were construed in such a way as to require more than the hearing rule at common law⁵².

⁴⁸ (2006) 228 CLR 152

⁴⁹ (2008) 172 FCR 1

⁵⁰ (2015) 148 ALD 507

⁵¹ *SZBEL v Minister for Immigration* (2006) 228 CLR 152 at 166 [48] per Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ

59. The common law would not have required a decision-maker to identify the differences in form and content between the certificates (and the fact that the third certificate was verified on the BRIS) as issues “critical to the decision”, those issues being “apparent from its nature or the terms of the statute under which it [wa]s made”⁵³. It was apparent from the terms of s.91WA of the Migration Act that the Tribunal was required to consider whether the applicant provided bogus documents as evidence of his identity. In any case, the key difference between the first and second birth certificates and the third birth certificate, namely, the birth registration number, was drawn to the applicant’s attention at the hearing⁵⁴.
60. Nor would the common law have required the Tribunal to draw to the applicant’s attention any conclusion arising from its having located a record relating to the applicant on the BRIS—for example, that the first and second birth certificates were bogus documents or that the third birth certificate was genuine. Those conclusions would be characterised as ones that were “obviously ... open on the known material”⁵⁵, such material comprising the first, second and third birth certificates (which the applicant supplied) and the BRIS (of which the applicant was already aware, it having been drawn to his attention at the hearing pursuant to s.424AA of the Migration Act).

Resolution

61. There is no doubt that a critical issue in the review was whether the applicant had provided a bogus document in connection with his visa application. There can be no doubt that the applicant was on notice of that issue. Sub issues in the review were whether all or any of the first, second or third birth certificates provided by the applicant were a bogus document. It is apparent from the Tribunal’s discussion of what occurred at the hearing that the Tribunal put the applicant on notice of those sub issues. There were three potential bogus documents and, at

⁵²Cf *SZBYR v Minister for Immigration* (2007) 81 ALJR 1190 at 1195 [14] per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ

⁵³*Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 592 per Northrop, Miles and French JJ

⁵⁴Transcript, page 6, lines 19-20

⁵⁵*Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 592

the Tribunal hearing, the Tribunal had not formed a view as to whether all or any of them were bogus documents.

62. Another issue in the review was whether (if the Tribunal found that the applicant had provided a bogus document or documents) the applicant had a reasonable explanation for providing the document or documents. The Tribunal plainly put the applicant on notice of that issue at the Tribunal hearing.
63. I accept that the circumstances left the applicant in a difficult position. In the first place, he had not conceded that any of the three birth certificates were a bogus document. Any submission he made as to his explanation for providing a bogus document would have to have been contingent upon a finding which the Tribunal, to that point, had not made, and without prejudice to his primary position that none of the documents were bogus.
64. The fact, however, that the applicant found himself in a difficult position does not result in a conclusion that the Tribunal breached s.425. The applicant was the author of his own misfortune. It was he who provided three different birth certificates which inevitably gave rise to questions about each of them. It was open to the applicant to attempt to explain to the Tribunal the circumstances in which each of the certificates were obtained in order to potentially support a conclusion that, if any of the certificates were found to be bogus documents, the Tribunal might nevertheless conclude that the applicant had a reasonable explanation for providing it or them. In circumstances where the Tribunal clearly articulated the problem confronting it (and the applicant) and invited submissions based on more than one possible contingency, which could have been coherently addressed by the applicant, there was in my view no unfair degradation of the hearing opportunity afforded to the applicant.
65. Further, I accept the Minister's contentions that no new issue arose after the hearing. As the Minister submits, any differences of form and content between the certificates were not new issues. Neither were the results of the Tribunal's own comparisons of the documents new issues.
66. It follows that Ground 2, including the additional particular, fails.

Ground 3 – did the Tribunal misconceive or misapply s.91WA(2)(b) of the Migration Act?

Applicant's contentions

67. The applicant contends that the Tribunal misconceived and misapplied what “a reasonable explanation for providing the bogus document” might be for the purposes of s.91WA(2)(a) of the Migration Act.

68. The Tribunal’s treatment of “the most plausible explanation” at [34] is said to expose its misunderstanding that where a document is bogus, in the sense of “purposely untrue”, its provision cannot at the same time be an “innocent, unintended or accidental matter”.

69. The Tribunal seems to have applied s.91WA(2)(a) according to what the Full Court said in *Trivedi v Minister for Immigration*⁵⁶ at [32] of PIC 4020:

PIC 4020 is not directed, in my view, to innocent, unintended or accidental matters. However different questions arise when information or documents provided in support of an application are revealed as false, in the purposely untrue sense of that term.

70. The Tribunal seems then to have interpreted a “reasonable explanation” in s.91WA(2)(a) as requiring an account of “innocent, unintended or accidental matters” in relation to the production of the birth certificates themselves. The applicant asserts that the intentions, knowledge or capacities of the person who ultimately provided the documents, or any other matters relating to the provision of the documents were not relevant to the Tribunal’s inquiry.

71. This is said to be apparent from the Tribunal’s account of the “most plausible explanation” at [34]. In this account it did not matter to the Tribunal whether the applicant knew that the first and second birth certificates were issued by the Bangladesh authorities or not. It was enough that the certificates were procured from “document forgers” and not issued by the Bangladesh authorities. It did not seem to have mattered to the Tribunal whether or not the applicant knew the birth certificates were not issued by the Bangladesh authorities.

⁵⁶(2014) 141 ALD 252

72. The applicant contends that the effect of this misunderstanding was to exclude any explanation which might concede the birth certificates were bogus but which nevertheless argued that their provision to the Minister was “reasonable”, for example because of a lack of knowledge on the part of the applicant or his mother at the time the certificates were provided, either that the certificates were bogus or as to why they were not issued by the authorities.
73. As a result of this misunderstanding the review functions of the Tribunal are said to have miscarried because the Tribunal limited its review to matters relating to whether or not the first and second birth certificates were bogus, in the sense of false, or “purposely untrue”.
74. There is said to have been no provision in PIC 4020 for a “reasonable explanation”, and no reason to limit that expression in the way the Tribunal has done.

Minister’s contentions

75. Ground 3 contends that the Tribunal misconstrued or misapplied the words “a reasonable explanation for providing the bogus document” in s.91WA(2)(a).
76. The applicant’s submissions focus on [34]⁵⁷ of the Tribunal’s reasons. There, the Tribunal said:

The Tribunal considers that the most plausible explanation is that, as claimed by the applicant, his lawyer pointed out a mistake in the birth certificate provided to the Department, namely that the date of birth in words referred to October rather than August. The applicant then tried to correct this mistake. However, because the birth certificate provided to the Department was not issued by the authorities in Bangladesh, the applicant would have to have had further recourse to document forgers in order to obtain the birth certificate provided to the Tribunal on 26 April 2016. The Tribunal finds accordingly, and therefore does not accept that it can be said that the provision of the bogus document was an ‘innocent, unintended or accidental matter’.

77. Earlier, at [31]-[33]⁵⁸, the Tribunal considered, and rejected, the explanation given by the applicant as to why he provided a bogus

⁵⁷ CB 194

⁵⁸ CB 193

document. The first was that “there were differences between the documents because they were issued by [two] different offices”⁵⁹. The second was that “it was not [the applicant’s] fault if the government is corrupt, or that things are not done properly in Bangladesh”⁶⁰.

78. Later, at [35]⁶¹, the Tribunal observed that what it considered to be the most plausible explanation for the provision of bogus documents was “supported by the applicant’s reluctance to provide what proved to be the genuine third birth certificate to the Tribunal” and his having done so “as a last resort after the Tribunal cast sustained doubt about the authenticity of the birth certificate provided to the Department and his attempted correction of this certificate.”
79. Read in context, therefore, the effect of the Tribunal’s reasons at [34]⁶² is said to have been merely that, because the applicant must have used document forgers to obtain the second birth certificate (in order to correct the error in the first birth certificate), it could not be said that the provision of the first and second birth certificates was innocent, unintended or accidental. The conduct in which the applicant engaged in the present case precluded any finding of innocence on his part. The effect of the final clause in [34]⁶³ is that the innocent, unintended or accidental provision of bogus documents *may* amount to a reasonable explanation for the purposes of s.91WA(2)(a).
80. The Minister further submits that there is nothing in the Tribunal’s reasons from which it can be inferred that it reasoned that nothing other than the innocent, unintended or accidental provision of such documents can satisfy the requirements of that provision, or that the applicant’s intention, knowledge or capacity was not relevant to the inquiry, contrary to the applicant’s submissions. In particular, the applicant’s submissions cannot be maintained in circumstances where he did not concede that he had provided bogus documents as evidence of his identity, nationality or citizenship but that, nonetheless, he had a reasonable explanation for having done so (for example, due to ignorance on his or his mother’s part, as he submits). The applicant only ever advanced two explanations for his having provided bogus

⁵⁹ at CB 193 [32]

⁶⁰ at CB 193 [33]

⁶¹ CB 194

⁶² CB 194

⁶³ CB 194

documents. None was based on a lack of knowledge that the documents were bogus, that they were not issued by the Bangladeshi authorities, or why they were not so issued. So much is apparent from the Tribunal's reasons at [21]-[23], [26] and [31]-[33]⁶⁴.

Resolution

81. It was open to the Tribunal to reject the applicant's explanation for having provided bogus documents for the reasons it gave. I agree with the Minister's submission that there was no misconstruction by the Tribunal of the expression "a reasonable explanation for providing the bogus document" in s.91WA(2)(a). The applicant was, of course, in a cleft stick. On the one hand he was unwilling to concede that any of the birth certificates were bogus. On the other hand he needed to say something in response to the Tribunal's call for him to offer an explanation.
82. The Tribunal might have been able to obtain more from the applicant if it had paid closer attention to the third birth certificate which is reproduced at CB 171. That discloses that, while the applicant was born on 3 August 1985, the birth was not registered until 19 October 2014, that is, after the applicant came to Australia. There may have been several reasons for that. It may not have been a priority for the applicant's parents to register his birth until the applicant needed to prove his identity. It seems to me likely that the first two birth certificates were produced informally in order to satisfy the Minister's Department and the Tribunal in circumstances where, to the point when the applicant left Bangladesh, there was no official record of his birth. Assuming that the Tribunal was correct and that the person described in the third birth certificate really exists, and is the applicant, the first two birth certificates were merely unofficial representations of true information. The vice in the documents was not that the information in them was untrue, but rather that they were falsely represented as official documents. If the applicant had taken the trouble to explain why his birth had not been registered prior to his departure from Bangladesh, the explanation might have carried some weight. He did not, however, take the trouble to make that explanation and in its

⁶⁴ CB 192-193

absence the Tribunal was entitled to reject the explanations given for the reasons it gave.

83. I reject Ground 3.

Conclusion

84. The applicant has failed to establish that the decision of the Tribunal is affected by jurisdictional error. The decision is therefore a privative clause decision and the application must be dismissed. I will so order.

85. I will hear the parties as to costs.

I certify that the preceding eighty-five (85) paragraphs are a true copy of the reasons for judgment of Judge Driver

Associate:

Date: 21 June 2017